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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 782

NATIONAL AIRLINES, INC., *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

The Railway Labor Act requires maintenance of the status quo during the pendency of the procedures prescribed by the Act for the resolution of a dispute over requested changes in contract terms. The question presented is whether, in the particular circumstances of

this case appraised in the light of the status quo requirement, the carrier's recourse during the status quo period to self-help to restore service interrupted by an unauthorized work stoppage did not properly extend to the mass discharge of all the strikers (comprising nearly all the work force) but was appropriately limited to replacement of the strikers.

STATUTE INVOLVED

Section 6 of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C. § 151, *et. seq.*) provides that:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . . In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

STATEMENT

National Airlines, an air carrier operating at John F. Kennedy Airport at New York and Miami International Airport, employs a class of workers known as mechanical, stores and related employees, represented in collective bargaining by the International Association of Machinists and Aerospace Workers (the Union). On October 31, 1968, National and the Union exchanged notices of the changes each desired in their

collective bargaining agreement in accordance with Section 6 of the Railway Labor Act (A. 11).[1] The consequence of the exchange of Section 6 notices was to invoke the statutory requirement of the Railway Labor Act to maintain the status quo pending exhaustion of the procedures prescribed by the Act for the resolution of a dispute over requested changes in contract terms (A. 11).

During the status quo period National reduced the number of men to taxi an aircraft from three to two, a change later found to violate its obligation to maintain the status quo (A. 12, and n.1, A. 32, n.2).[2] On January 17, 1969, based on apprehension concerning safety, three men refused to taxi an aircraft with the reduced complement, and National thereupon suspended them (A. 11-12). Almost immediately after the suspension of the three men, in protest against it, their fellow employees at John F. Kennedy Airport and Miami International Airport refused to work (A. 12). The strike was not authorized by the Union (A. 12).

On January 18, 1969, on National's application and with the Union's acquiescence, the District Court enjoined the work stoppage, and, at the Union's instance, ordered the use of three men to taxi aircraft (A. 12).

National resumed taxiing aircraft with three men but did not then lift the suspension of the three employees (A. 12, 23). In these circumstances the Union's attempts to return the strikers to work were unsuccess-

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[1] The symbol "A" followed by the numeral refers to the page of the decisions of the Court of Appeals and the District Court as reproduced in the petition. The symbol "R" refers to the appendix in the Court of Appeals.

[2] See also, *National Airlines* v. *International Association of Machinists and Aerospace Workers*, 303 F. Supp. 1132, 1134 (S. D. Fla.).

ful and the stoppage continued (A. 12). On January 20, 1969, upon National's request for further relief, the District Court entered an order requiring that the Union "advise the membership that it is the order of the defendant IAM that all men return to work by their next shift, and that individuals who refuse to so report are subject to penalties *which could include dismissal by National Airlines*" (A. 12-13, emphasis added by Court of Appeals). At 3:41 p.m. that afternoon, the Union sent out 993 telegrams advising its members of the District Court's second order (A. 13). About 7:00 p.m. that evening, without prior authority of the Court, National notified the strikers that they would be terminated if they did not report for duty at their next regularly scheduled shifts starting at 3:30 p.m. the next day, January 21 (A. 13, 23, n.1).

When the strikers did not return to work the next day at the 3:30 p.m. shift, National forthwith sent termination notices to approximately 940 workers (A. 13). Immediately *after* making this mass discharge, National notified the three men whose suspension had triggered the strike that they would be allowed to return to work on Friday, January 24, three days after the discharge of the strikers (A. 23). The Union promptly sought an injunction of the District Court seeking to require the reinstatement of all discharged employees (A. 13). On January 24 the parties were before the District Court to be heard on the Union's request to vacate the mass discharge (R. 221-287, 444-448, first appeal). The Union's counsel pleaded that, "I could guarantee to Your Honor today that 940 people, if that telegram or wire [discharging them] was rescinded by the Court's order, I could guarantee that 940 people that were discharged and every employee on the airline would be back to work tomorrow" (*id.*

279-280). But National opposed any relief, arguing that it had the right to discharge the strikers, and it did not choose to relent (*id.* 259-276, 285-287). The District Court denied any relief against the mass discharge (A. 13).

The Court of Appeals reversed on appeal. It held that "the mass discharge of the strikers exceeded the permissible bounds of self-help under the circumstances" (A. 24). It reached this conclusion by striking a statutory balance between the obligation to maintain the status quo and the need to restore service in coping with an unauthorized stoppage in the particular circumstances of its occurrence. In striking a balance it adopted as the premise of decision that the "carrier's resort to self-help was justified only to the extent necessary to restore service; its exercise was allowable only insofar as it served that end" (A. 22). It explained that the mass discharge exceeded the justifiable limits for the following reasons (A. 22-23):

> We do not think the mass discharge of the strikers in this case can be justified by the need to restore service. . . . The discharge of the strikers was not necessary in order to hire a new labor force. Under both the NLRA and the Railway Labor Act, a carrier need not discharge those hired to replace strikers. . . . The hiring of replacements for the strikers would have been consistent with the attempt to restore service. The discharge of those best suited to carry on the carrier's business, on the other hand, would seem self-defeating: It prevented the possible restoration of the *status quo* should some or all of the strikers choose to return to work before enough replacements were hired. In this connection, we note that immediately after the discharge of the strikers, National notified the three men whose suspension had triggered the strike that they would be allowed to return to work on Friday, January 24, 1969,

> three days after the discharge of the strikers. It is possible that the strikers would have returned to work on Friday, January 24, when the three disciplined employees returned to work. The carrier's discharge of the strikers, therefore, may have foreclosed any opportunity to end the strike and restore the *status quo*.

The Court of Appeals further observed that by the mass discharge National had acted precipitately and without prior leave of the District Court (A. 23, n.7):

> Additionally, we think National acted too hastily when it determined to discharge the strikers rather than returning to the district court for further advice. The court's order indicated only that the failure to return to work "could" subject the strikers to dismissal by National, not that it would do so. The primary responsibility for ending the strike rested in the district court: It was the court's responsibility and prerogative, not the carrier's, to compel compliance with the court orders. Before resorting to self-help, National should have sought authority from the court.

Having determined that replacement, but not discharge, was appropriate as self-help, the Court of Appeals ordered a remand and defined the issues open on remand as follows (A. 23-24):

> As indicated, replacement of the strikers, but not discharge, would seem compatible with the need to restore service. It follows that those strikers whose positions were filled either at the time of the discharge or before the time the strike would have run its course are *not* entitled to reinstatement. On the other hand, strikers for whom no replacements had been found when the strike probably would have ended *are* entitled to reinstatement from the time they would have returned to work. This will require a factual determination on remand of the point in time when the strikers

> would have returned to work, *e.g.*, the date the three suspended employees in New York returned to work. The strikers, who are in a better position to cast light on this issue, should carry the burden to show when they would have returned to work in the absence of the discharge. Strikers who had not been replaced at that time, as revealed by company records, are entitled to reinstatement.

Accordingly, the sole matters open on the remand were (1) determination of the time when the strikers would have returned to work, (2) ascertainment of the number of strikers who had been replaced as of that time, and (3) direction that National reinstate the unreplaced strikers. (A. 23-24, 1-4).

On remand, the District Court found that, (1) but for the mass discharge, the stoppage would have ended on January 24, 1969, with the lifting of the suspension of the three men who had refused to taxi aircraft with a reduced crew (A. 28-29), and that, (2) on January 24, 67 strikers had been replaced by National (A. 29). But the District Court nevertheless refused to direct the reinstatement of the unreplaced strikers because in its view the mass discharge was essential to restoration of service (A. 29-34).

On a second appeal the Court of Appeals again reversed. It held that (1) limitation of self-help to replacement had been settled on the previous appeal and and redetermination of that issue was beyond the authority of the District Court (A. 1-4), (2) the District Court had applied erroneous standards in determining that 67 strikers had been replaced and it should reconsider in accordance with the correct standards whether that or a lesser number of strikers had been replaced (A. 6-7), and (3) those strikers determined to be unreplaced "must be reinstated with full benefits including back pay" (A. 7).

ARGUMENT

The decision below is a reasonable accommodation of competing considerations in applying the status quo requirement of the Railway Labor Act to particular circumstances, involves no conflict of decision, and pertains to an atypical and nonrecurrent situation. Grant of certiorari would therefore not be warranted.

1. The premise of the Court of Appeals in illegalizing the mass discharge is that, in the operation of the scheme of the Railway Labor Act, it is indispensable to maintain the status quo during the period that agreement is sought through utilization of the statutory machinery. This Court has recently emphatically reaffirmed this statutory imperative. *Detroit and Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142. The Act "imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted". *Id.* at 149. As the Court stressed, "The Act's status quo requirement is central to its design." *Id.* at 150.

Relating the statutory mandate to the factual situation, the Court of Appeals reasonably concluded that the mass discharge, at its inception and through its continuance, utterly defeated the Act's central design. Of the approximately 1,300 employees within the class represented by the Union (R. 12, first appeal), National terminated at least 1,098 (R. 1465-66, 5-82, 87, 1081-83, 1099-1101, 1117, 1120, 1574-78, 1485-86, 1488-89, 1496-97, 1240, 1356), almost 85 percent of the work force. Discharge of 85 percent of the work force is repugnant to any concept of maintaining the status quo. Of the discharged employees, 126 returned as

new employees (R. 1574-78, 1284-86, 1488-89, 1496-97, 1240, 1356), having accepted National's offer to rehire discharged but unreplaced strikers as new employees without seniority (R. 1297, 1299). To return as a new employee without seniority is to lose all the equity that the employee had accumulated before his discharge. Thus, as a new employee one striker would lose thirteen years of seniority (R. 1372-73), another twelve years (R. 1388-89), a third seventeen years (R. 1399), and a fourth sixteen years (R. 1414). Loss of these years of service "invested in National" (R. 1373), with consequent drastic impairment in job security, turns the status quo upside-down. The upshot of the mass discharge was thus that almost 75 percent of the work force was stripped of jobs and almost ten percent of seniority.

This decimation of the work force is the antithesis of the maintenance of the status quo. Instead of negotiating new contract terms in an atmosphere free of contested alteration of existing conditions, the Union was plunged into a fight for the economic survival of its members. And that fight was itself precipitated by National's illegal alteration of the status quo by reducing from three to two men the complement used to taxi aircraft (*supra,* p. 3). Furthermore, despite the eventual availability of judicial relief requiring the employees' ultimate reinstatement with full seniority, the reality of National's interim persistence in the mass discharge was that its continuing denial of jobs to the employees served as a partial lockout. The result was that, while the Union was unable to call a full-fledged strike, National enjoyed the benefit of the economic pressure of a partial lockout. Thus, during a period when negotiations should have been free of economic weaponry, National had in hard fact brought

it arms into play, and the Union was disabled from responding. Finally, while the employees will ultimately be made whole for their loss of earnings and benefits resulting from their discharge, retroactive compensation never adequately restores the status quo. "In view of 'the economic hardship caused by . . . undeservedly substandard earnings' [in the interim prior to reinstatement], lengthy delays 'must render the back pay award a wholly inadequate and unsatisfactory remedy' to the employees for the company's refusal to reinstate them." *N.L.R.B.* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264.

This obliteration of the status quo was not essential to restoration of service. The Court of Appeals reasonably concluded that the "discharge of the strikers was not necessary in order to hire a new labor force" (A. 22), that the "hiring of replacements for the strikers," rather than their discharge, provided ample means to "restore service" (A. 23-24), and that the mass discharge, instead of furthering that object, positively interferred with the "opportunity to end the strike and restore the status quo" (A. 23). In striking this balance between the status quo and self-help in coping with the specific circumstances of a particular unauthorized strike, the Court of Appeals arrived at an informed and sensitive reconciliation of competing considerations in the application of the Railway Labor Act. Where, "as here, a statutory standard . . . can have meaning only in its application to the particular facts of a particular case" (*N. L. R. B.* v. *American National Insurance Co.*, 343 U.S. 395, 410), this Court "should 'adhere to the usual rule of non-interference' " with conclusions of the Courts of Appeals. *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, 503. This is the kind of question which is "in the keeping of the Courts

of Appeals." *Universal Camera Corp.* v. *N. L. R. B.*, 340 U.S. 474, 491. In this case six different appellate judges on two appeals have unanimously concluded that National violated the Railway Labor Act. That is review enough.

2. There is no merit to National's claim that the decision below is incompatible with the rule evolved under the National Labor Relations Act authorizing the discharge or discipline of wildcat strikers (Pet. 8-11). The Court of Appeals pointed out that the analogy was false because it "fails to take into account the Railway Labor Act's explicit ban on self-help during the 'freeze' imposed while the procedures of the Act run their course, a factor not present in the scheme established by the National Labor Relations Act" (A. 19). Giving effect to this crucial difference, the Court of Appeals concluded that, in order to preserve the Railway Labor Act's emphasis upon "'cooling off' policies" and forbearance from self-help, of itself "the illegality of the strike [n]either relieved National of its duty to maintain the status quo [n]or justified the discharge of the strikers" (A. 19-20). The Court of Appeals thus heeded, as it noted (A. 18), this Court's admonition that the "National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383.

3. National overstates the question that can be presented when it asks whether "the Railway Labor Act prohibit[s] a carrier from discharging illegal wildcat strikers" (Pet. 2). The only issue is the restriction

that the Railway Labor Act imposes on recourse to self-help during the period that the status quo must be maintained. The legitimacy of resort to self-help at any other time is not involved. And even during the status quo period, the scope of the restriction is not absolute, but relates to the permissibility of self-help in the light of particular circumstances.

4. Although not part of the question it seeks to present and not fairly comprehended by it (Pet. 2), National objects to the requirement that it make the unreplaced strikers whole for the loss of earnings and benefits they suffered commencing with the time that the stoppage would have ended but for the mass discharge and ending with reinstatement (Pet. 13-15). "The legitimacy of backpay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute. . . ." *N. L. R. B.* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263. National nevertheless protests that the employees should have returned to work as new employees and contested their loss of seniority by recourse to judicial and contractual remedies; their failure to do so, National argues, should toll back pay because the employees did not "mitigate their damages . . ." (Pet. 13-14). But it is settled law that in order to terminate its back pay liability an employer must offer the employee full and unconditional reinstatement; an employee is not required to submit to less than his due in order not to lose backpay.[3] Mitigation aside, National catalogues other sins it attrib-

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[3] *Electro-Mechanical Products Co.*, 126 NLRB 637, 648-650; *N.L.R.B.* v. *Mooney Aircraft*, 366 F.2d 809, 812 (C.A. 5); *Corning Glass Works* v. *N.L.R.B.*, 129 F.2d 967, 969 (C.A. 2); *N.L.R.B.* v. *Poultrymen's Service Corp.*, 138 F.2d 204, 210 (C.A. 3); *N.L.R.B.* v. *Armour Co.*, 154 F.2d 570, 577 (C.A. 10).

utes to the employees in order to justify denial of back pay (Pet. 13-15). Its broadside is wide of the mark. For National persistently overlooks the fact that for the period for which back pay is due—from the terminal date of the stoppage until full reinstatement is granted—it is National's own wrong in insisting upon the mass discharge which alone caused the loss, and National is simply being required to make good the harm it inflicted by its illegal action. At any rate, whether backpay ordinarily due should be denied because of claimed special circumstances presents no question warranting review. No more is involved than "a fair assessment of a record", and in such situations the Court "should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' " *N.L.R.B.* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, 502-503.

5. The Court of Appeals stressed "the unusual circumstances of this case" (A. 10), and emphasized that its "holding is limited to the facts of this case" (A. 24). A spontaneous work stoppage by employees over an issue unrelated to the negotiations, unauthorized by the Union and uncontrollable by it, is highly atypical. An employer's institution and persistence in a mass discharge is also an altogether atypical reaction. The situation is singular and nonrecurrent, and therefore does not merit this Court's review.

6. One final consideration should be mentioned. On April 23, 1970, National and the Union executed an agreement requiring reinstatement of the mass-discharged employees with full seniority, establishing January 31, 1970 as the cut-off date for computation of backpay and other benefits should the employees' make-

whole claims be sustained, and providing that "[s]uch claims shall be determined by the pending appeal in NAL vs. IAM No. 29234 and in any proceedings ensuing from it." The discharged employees have since been reinstated with full seniority in accordance with the agreement, and the Court of Appeals has since determined that the employees "entitled to reinstatement must be reinstated with full benefits including backpay" (A. 7). Agreement and adjudication have thus put a major part of the controversy to rest, further deemphasizing the existence of any "special and important reasons" for review. U.S. Sup. Ct. Rules 19(1).

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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